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No. 95-1301

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

PAUL E. THOMSON, M.D.,
Petitioner,

v.

JUDITH A.K. HARMONY, PH.D., ANDREW T. FILAK, JR., M.D., EVELYN V. HESS, M.D., GENE CONWAY, M.D., JOHN HUTTON, M.D., JOSPEH BRODERICK, M.D., MICHAEL E. LUGGEN, M.D., [*sic*] and KATHLEEN ROBBINS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Ohio may conditionally waive its Eleventh Amendment immunity.

CONSTITUTIONAL PROVISION

U.S. CONST. amend. XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

Respondents adopt for their statement of the case that which is contained in the opinion of the Sixth Circuit Court of Appeals below issued September 18, 1995, reported at 65 F.3d 1314 and reproduced in Petitioner's Brief at App. 2-5. Respondents note that Dr. Michael E. Luggen, whose name appears in the caption of Petitioner's Brief, was never named as a party in the federal case below, but was a "straw man" defendant in the Ohio Court of Claims action in place of Dr. Donald K. Ebersold, who was a party in the original federal case. See Opinion of the Sixth Circuit Court of Appeals below at 65 F.3d 1314, 1320 & n.5 reproduced in Petitioner's Brief at App. 10.

REASONS FOR DENYING THE PETITION

1. The decision of the Sixth Circuit Court of Appeals below, reaffirming its longstanding interpretation of Ohio Rev. Code § 2743.02(A)(1) as a conditional waiver of Ohio's Eleventh Amendment immunity, is unrelated to the Ohio Supreme Court's holding with respect to Ohio Rev. Code § 2742.02(F) in *Conley v. Shearer*, 64 Ohio St. 3d 284, 595 N.E.2d 862 (1992), upon which Petitioner relies.

2. The Sixth Circuit Court of Appeals' interpretation of the impact of Ohio Rev. Code § 2743.02(A)(1) on a parallel federal claim under 42 U.S.C. § 1983 has been established law for nearly a decade. This Court has previously denied certiorari on this same issue. *Leaman v. Ohio Department of Developmental Disabilities*, 825 F.2d 946 (6th Cir. 1987), cert. den., 487 U.S. 1204 (1988). The *Leaman* doctrine is the accepted and usual course of judicial proceedings in the Sixth Circuit.

Conley v. Shearer, whose syllabus is the statement of the law of that case, (see *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976) and *Cassidy v. Glossip*, 12 Ohio St. 2d 17, paragraph six of syllabus, 231 N.E.2d 64 (1967)), deals only with Ohio Rev. Code § 2743.02(F) and presents no basis for review of Ohio Rev. Code § 2743.02(A)(1).

Furthermore, Petitioner's "exhaustion of state remedies" analysis concerns a matter which is not an issue in this case. Petitioner simply elected a special remedy created by Ohio's conditional waiver of its Eleventh Amendment immunity. Petitioner's election to seek redress of his claims in Ohio's Court of Claims was in exchange for redress of claims against state employees in federal court based upon the same acts or omissions.

Ohio Rev. Code § 2743.02(A)(1); *Leaman*, 825 F.2d 946. Thus, it was Petitioner's election of a particular remedy, not any requirement of exhaustion of remedies, which resulted in dismissal of his federal claims.

CONCLUSION

Petitioner has stated no basis for this Court to grant a Writ of Certiorari. Respondents respectfully pray that a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Sixth Circuit entered on November 1, 1995 be denied.

Respectfully submitted,

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